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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6732

JAMES CHAFFIN,

Petitioner,

v.

LEROY STYNCHCOMBE, SHERIFF OF FULTON COUNTY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

PART ONE

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 455 F.2d 640 (1972). The Petition for Re-Hearing is reported in the opinion.

JURISDICTION

Jurisdiction is conceded.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Respondent concedes that the Constitutional Provisions and the Statutes Involved, as set out in the Petitioner's Brief are the legal provisions to be applied to the case *sub judice*.

In addition Respondent would add the following Georgia Statutes as also being involved in the case:

Georgia Code 27-2501. Punishment; recommendation of the jury, provides:

"All felonies, except treason, insurrection, murder, (robbery by force?), manslaughter, assault with intent to rape, rape, sodomy, foeticide, mayhem, seduction, arson, burning railroad bridges, trail-wrecking, destroying, injuring, or obstructing railroads, perjury, false swearing, and subornation or perjury or false swearing, shall be punished by imprisonment and labor in the penitentiary for the terms set forth in the several sections in this Code prescribing the punishment of such offenses; but on the recommendation of the jury trying the case, when such recommendation is approved by the judge presiding on the trial, said crimes shall be punished as misdemeanors. If the judge trying the case sees proper, he may, in fixing the punishment, reduce such felonies to misdemeanors."

Georgia Code 27-2502. Determinate sentences for felonies not punishable by life imprisonment, provides:

"The jury in their verdict on the trial of all cases of felonies not punishable by life imprisonment shall not

prescribe an indeterminate sentence for a minimum and maximum term, but shall prescribe a determinate sentence for a specific number of years, which shall be within the minimum and maximum prescribed by law as the punishment for said crime, and the judge in imposing the sentence shall sentence said convicted person to the penitentiary in accordance with the verdict of the jury. However, the judge imposing said sentence is hereby granted power and authority to suspend or probate said sentence, under such rules and regulations as he thinks proper. The judge is also empowered with the right and authority to revoke said suspension or probation when the defendant has violated any of the rules and regulations prescribed by the court. In cases of pleas of guilty, the judge, and not the jury, shall prescribe a degerminate sentence for such specific number of years as he may see fit: Provided, that after the term of court at which sentence is imposed the superior court judges shall have no authority to suspend, probate, modify or change the sentences of said prisoners except as otherwise provided."

Georgia Code 27-2709. Same; jurisdiction of courts; procedure; hearings; reference to circuit probation officer; period of probation; disposition of prisoner pending hearing; payment of fines or costs as condition precedent to probation, provides:

"Any court of this State which has original jurisdiction of criminal actions, except juvenile courts, municipal courts and courts of ordinary where the defendant in a criminal case has been found guilty upon verdict or plea, or who has been sentenced upon a plea of nolo contendere, except for an of-

fense punishable by death or life imprisonment, may, at a time to be determined by the court, hear and determine the question of the probation of such defendant. . ."

QUESTION PRESENTED

Respondent takes issue with the "Question Presented" as set out in the Petitioner's Brief. Respondent has, accordingly, restated the same as follows:

1. Does the Fifth Amendment, as incorporated into the Fourteenth Amendment, absolutely prohibit a Defendant from receiving, on retrial, a sentence greater than one he received in a former trial which former conviction was reversed on appeal; and

2. Conceding that said Amendment is not an absolute bar to an increased sentence on retrial, can vindictive reasons for the increased sentence be presumed absent when the second trial is conducted before a different judge and a different jury (which jury cannot legally be informed by the Prosecution of the results of the former trial) with a different defense attorney and different defense.

STATEMENT OF THE CASE

The first two paragraphs of Petitioner's "Statement of The Case" are correct. Thereafter we take issue with said "Statement of The Case," and submit our own.

THE CASE

After the U. S. District Court granted the Petitioner's application for Writ of Habeas Corpus, and ordered a new trial, the Petitioner was returned to Fulton County, Georgia for retrial.

He was put on trial before a different judge and different jury (which jury had no knowledge of the Petitioner's previous trial and conviction, nor did such jury have knowledge of the sentence imposed in the first trial. Additionally, different prosecution and defense witnesses were called and testified at the new trial). The Appellant was also represented by different defense counsel, who interposed a different defense than that previously relied upon. (At his first trial the Petitioner relied exclusively on the defense of alibi. At his second trial the Petitioner continued to rely on the defense of alibi, but he also added a second inconsistent defense—insanity. To summarize his defenses he avers "I am not guilty of the crime because I was not there; but even if I was there and committed the offense, I am still not subject to punishment because I was insane when I committed the crime." See *Chaffin v. State*, 227 Ga. 327, 328, (2) (1971), 180 S.E.2d 741 (1971).

After finding him guilty for a second time the jury fixed the Petitioner's sentence at life imprisonment, and said sentence was made the judgment of the Court. On appeal the second judgment and conviction were affirmed. *Chaffin v. State, id.*

Thereafter Petitioner filed a second application in the District Court for Writ of Habeas Corpus, (A-4,5,6,7), which Court denied the same. A-11, 12, 13. The District Court's decision was appealed to the Fifth Circuit Court

of Appeals, which Court affirmed the District Court. A-14-22. *Chaffin v. Stynchcombe*, 455 F.2d 640 (5th Cir., 1972). Both Courts rejected Petitioner's contention to the effect that the Fifth Amendment's Prohibition against double jeopardy, and the Fourteenth Amendment's Clauses requiring due process of law and prohibiting a denial of equal protection of the law, as construed in *North Carolina v. Pearce*, 395 U.S. 711, were an absolute bar to an increased sentence on retrial. What is prohibited, the Courts' stated in construing *Pearce*, was an increased sentence based on a retaliatory motivation or vindictiveness alone.

PART TWO

ARGUMENT AND CITATION OF AUTHORITY

A. THERE IS NOT CONSTITUTIONAL PROHIBITION AGAINST A DEFENDANT RECEIVING A HARSHER SENTENCE ON A RETRIAL THAN THAT RECEIVED IN A FORMER TRIAL.

The Petitioner contends that the Fifth Amendment Prohibition against double jeopardy, and the due process and equal protection clauses of the Fourteenth Amendment constitute an absolute bar to increasing a defendant's sentence upon his conviction on retrial, he, having successfully had his former conviction set aside. The issue thus raised has been settled by this Court adversely to such a contention in *Straud v. United States*, 251 U.S. 15, 64 L.Ed. 103, ___ S.Ct. ___ (1919); *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, ___ L.Ed.2d ___ (1969); *Colten v. Kentucky*, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, 40 U.S. Law Week 4703 (June 12, 1972).

There is, accordingly, no absolute constitutional prohibition against increasing a sentence on retrial from that affixed at a former trial. The only question thus presented is "To what extent does the Constitution limit the imposition of a harsher sentence after conviction upon retrial?" *North Carolina v. Pearce,* 395 U.S. @ 275.

B. WHERE THE ISSUES OF RETALIATORY MOTIVATION OR VINDICTIVENESS ARE ABSENT, NO CONSTITUTIONAL INFIRMITY SURROUNDS A HARSHER SENTENCE ON RETRIAL; PARTICULARLY WHERE THE INCREASED SENTENCE FIXED BY A DIFFERENT JURY WITH NO KNOWLEDGE OF THE DEFENDANT'S FORMER TRIAL; AND JUDGMENT IS ENTERED ON THE NEW SENTENCE BY A DIFFERENT JUDGE THAN THE JUDGE INITIALLY IMPOSING SENTENCE, AND WHERE A NEW SEPARATE DEFENSE IS INTERPOSED BY A NEW DEFENSE COUNSEL, WHICH DEFENSE IS NOT INCONSISTENT WITH GUILT, AND WHERE NEW, DIFFERENT WITNESSES FOR THE PROSECUTION AND THE DEFENSE APPEAR AND TESTIFY.

In Georgia, except where a jury trial is waived, the jury trying the case fixes the sentence to be imposed on a convicted defendant. See Georgia Code Sections 27-2501, 27-2502, and former Code Sections 26-2501 and 26-2502. Where the imprisonment is for a term of years the trial judge is granted the authority to suspend or probate any part or all of the sentence fixed by the jury. His power to suspend or probate such sentences does not, however,

extend to those cases in which a punishment of life imprisonment, is prescribed. See Georgia Code Sections 27-2502, 27-2709.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969) this Court stated:

> "In order to assure the absence of [vindictiveness], we have concluded that whenever a *judge* imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based on objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal."

Id. at 726, emphasis added, as quoted in *Chaffin v. Stynchcombe*, 455 F.2d @ 642, and the unreported District Court decision A-11-12.

In applying this test to the Georgia procedure utilized in the case *sub judice* the District Court and the Fifth Circuit Court of Appeals observed that it is possible to conceive of circumstances where a jury might impose harsher sentence upon retrial for vindictive reasons. "But a jury will normally be unaware of the prior trial, much less the sentence. Under the facts and circumstances of this case the likelihood of vindictiveness is so remote that . . . [said Court] feels the burden must be upon the defendant to show that the jury acted out of vindictiveness in imposing the increased sentence." *Id.* at 643. The

Court then observed that there was no issue of vindictiveness present either in the record or the briefs.

As was stated by said Court in a pre *Pearce* case:

> "In our view it would be wholly incongruous and without constitutional foundation, to hold that a state is forever bound by and may not increase a jury imposed sentence but that the defendant may never the less shoot for its reduction with a guarantee in advance that the next jury cannot increase the penalty, although acting on the evidence it has heard and entirely free of any knowledge from which it might impose punishment for taking the appeal."

Salisbury v. Grimes, 406 F.2d 50 (5th Cir., 1969), remanded with instructions to dismiss as moot in an unreported en banc order dated October 8, 1970.

As previously mentioned no contention has been made or suggested that the second jury had any knowledge of the Petitioner's former conviction or the sentence imposed as a result of said conviction, nor could the record or briefs lend support to such a contention, if made. In short, it is impossible to conclude that the second jury fixed a harsher sentence on the Petitioner based on a retaliatory motivation or vindictiveness as a result of the defendant's having successfully had his first conviction set aside on appeal, since the second jury had no knowledge of the former trial, conviction and sentence. Compare *Kansas City v. Henderson,* 468 S.W.2d 48 (Mo. Sup. Ct. 1971).

Additionally, the record of the second trial, in any event, is sufficiently different from the first trial to justify the imposition of the harsher sentence. In the first trial the Petitioner relied on the defense of alibi. Such a de-

fense does not deny (or admit) that the crime occurred but that the Petitioner was not the guilty party because he was elsewhere (if the crime occurred).

In his second trial the Petitioner continued to rely on his defense of alibi, but he also put forth an additional defense—insanity, which defense is consistent with a defense of alibi. Such a defense in effect admits that the crime occurred and that the defendant committed it, but that he is not subject to punishment for his criminal conduct because he lacked the requisite mental capacity to intend to commit a crime.

While we do not dispute a defendant's right to raise inconsistent defenses, we submit that the jury and the trial judge have the right to consider the inconsistency in fixing a sentence. Thus the Court and jury could properly conclude that it would be physically impossible for the Petitioner to not commit the crime because he was elsewhere, and at the same time commit the crime while he was insane. One version of his defense must therefore be false and analogous to perjury—a sufficient reason to justify a harsher sentence. See *U.S. v. Sanders,* 435 F.2d 165 (9th Cir., 1970). Assuming that the jury chose to give credit to that part of the Petitioner's story which, in effect, admitted his presence at the crime scene and his conduct in perpetrating the crime, all doubt is removed as to his participation in the crime. These circumstances are, likewise, sufficient to justify a harsher sentence. Compare *U.S. v. Kenlen,* 415 F.2d 557 (10th Cir., 1969).

Additionally, the doctrine set out in *Pearce* prohibiting a harsher sentence on retrial unless supported by facts and reasons in the record, does not even apply where the

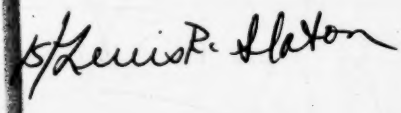
jury, rather than the trial judge fixes the sentence, such as in the case *sub judice*. See also *Kansas City v. Henderson*, 468 S.W.2d 48 (Mo. Sup. Ct., 1971); *Beltowski v. State*, ____ Ky. ____, 183 N.W.2d 563 (Minn., 1971).

Nor can it be argued that the Court (trial judge) abused its discretion in not modifying the sentence fixed by the second jury to that fixed by the first jury, since, under Georgia Code Sections 27-2502 and 27-2709, the Court (trial judge) had no such power in view of the sentence fixed by the jury; and, even if the statutes authorized him to do so, the reasons set forth above were sufficient for him to decline to exercise such discretion, and thus support the judgment setting the Petitioner's sentence at life imprisonment.

CONCLUSION

For the above reasons the judgment of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, JOEL M. FELDMAN, hereby certify that I have this day deposited three copies of the within and foregoing brief for respondent in the case of James Chaffin, Petitioner, v. LeRoy Stynchcombe, Sheriff of Fulton County, Respondent, Docket No. 72-6732 in the Supreme Court of the United States, in a United States mail box, with first class postage prepaid, addressed to Glenn Zell, Esq., Counsel of record for James Chaffin, Petitioner, at his address of record, 15 Peachtree Street, N.E., Atlanta, Georgia 30303.

This 9th day of January, 1973.

Original signed by:

JOEL M. FELDMAN
Of Counsel for LeRoy Stynchcombe,
Sheriff of Fulton County, Respondent